BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TRISHA K. KARMANN Claimant	)	
V.	)	Docket No. 1,063,769
VIA CHRISTI HEALTH, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

All parties requested review of the June 5, 2015, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on October 6, 2015. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Carla Snyder of Overland Park, Kansas, appeared for self-insured respondent.

The ALJ found claimant sustained a five percent impairment to the body as a whole related to her cervical complaints. The ALJ determined claimant is not eligible for a work disability award. The ALJ found claimant is not entitled to future medical treatment.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the credible evidence proves she suffered an 8 percent impairment to the body as a whole, and the prevailing factor for her back complaints is the work-related accident of October 26, 2012. Claimant contends she is entitled to future medical treatment based on the uncontroverted medical evidence. Further, claimant argues she was not terminated for cause and is therefore entitled to an award for a work disability.

Respondent argues claimant failed to prove she sustained an injury to her cervical spine arising out of and in the course of her employment. Alternatively, respondent contends claimant sustained a five percent functional impairment to the body as a whole and is not entitled to an award for a work disability. Respondent argues claimant is not entitled to future medical treatment.

The issues for the Board's review are:

1. Did claimant sustain personal injury by accident to her cervical spine arising out of and in the course of her employment?

2. What is the nature and extent of claimant's disability?

3. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant was employed at Mercy Regional Health Center (respondent) as a certified nurse aide (CNA). This position required claimant to take care of patients, including lifting and transferring patients. Claimant worked full-time, earning an average weekly wage (AWW) of $338.53.

On October 26, 2012, claimant and a coworker lifted a patient when claimant felt a pull in her back. Claimant testified she could not say which part of her back she injured because "the pain went up and down [her] spine."[1]

Claimant reported the injury to respondent and was referred to occupational health physician Dr. Rahila Andrews. On October 30, 2012, claimant described the work incident to Dr. Andrews and indicated an onset of pain in her left lower back. Claimant told Dr. Andrews the pain radiated into her left leg with chronic numbness and tingling in her right great toe. Claimant also reported chronic baseline back pain and pain which radiated up her spine. Claimant had no complaints related to her thoracic or cervical spine on October 30, 2012.

After reviewing claimant's medical records, history, and performing a physical examination, Dr. Andrews determined claimant sustained general pain in the lumbar spine and provided conservative treatment. Dr. Andrews restricted claimant to no lifting greater than 20 pounds, no patient lifts or transfers, and avoid prolonged or repetitive bending and twisting. Dr. Andrews provided pain medication and muscle relaxants.

Claimant visited her primary care physician, Dr. Sandra Killingsworth, on October 30, 2012. Dr. Killingsworth had treated claimant for chronic low back pain since 2008. Previously, claimant's low back pain stretched across the lumbar spine. Claimant indicated to Dr. Killingsworth the pain changed to the left side of her lumbar spine following the October 26, 2012, incident. She had no thoracic or cervical complaints on that date. Dr. Killingsworth performed a physical examination and assessed claimant with left-sided lumbar back pain. Dr. Killingsworth prescribed pain medication.

---

[1] R.H. Trans. at 11.

Claimant returned to Dr. Andrews on November 6, 2012, with primary complaints of worsening bilateral low back pain. Dr. Andrews provided trigger point injections to the bilateral lumbar paraspinous and right parathoracic muscles. Dr. Andrews recommended claimant continue with conservative treatment and work restrictions. On November 21, 2012, Dr. Andrews provided additional trigger point injections to claimant's bilateral lumbar and bilateral thoracic muscles. Claimant indicated her low back pain was improved but had tender points in her thoracic musculature, and Dr. Andrews continued conservative treatment and work restrictions.

Claimant went to the emergency room on November 27, 2012, with complaints of pain and limited range of motion in her neck and mid to upper back, which she attributed to the injections she received six days prior. Claimant saw Dr. Andrews the following day with complaints of sharp, stabbing and shooting pain in her right thoracic back. Dr. Andrews noted the pain started the day before and was accompanied by pain and numbness radiating under claimant's right arm to her elbow. Dr. Andrews could not testify as to whether the area of claimant's thoracic pain was the same area she injected, but stated she did not expect the injections to cause claimant's complaints. Dr. Andrews did not provide injections to claimant's neck. Dr. Andrews performed a physical examination and diagnosed claimant with lumbar spine pain and thoracic spine myofascial pain. She recommended claimant begin physical therapy for her cervical and thoracic spine.

Claimant returned to Dr. Andrews on December 12, 2012. Claimant complained of constant sharp, tight pain in her right thoracic back and constant sharp, tense pain in her neck. Claimant also complained of headaches and radiation and tingling to her right elbow and bilateral hands. Dr. Andrews noted claimant's complaints began 15 days prior to the visit. Dr. Andrews wrote, "[Claimant] now falls into the range of subacute back pain, with some questionably cervical radicular complaints, so we will request T-spine and C-spine MRIs. Her tension-type headaches may be relate[d] to her neck pain or as a symptom of stress."[2] Dr. Andrews recommended claimant continue with her restricted duties and physical therapy.

An MRI dated January 2, 2013, of claimant's thoracic spine was unremarkable. An MRI of claimant's cervical spine was read to reveal:

> Mild degenerative changes at C4-5 through C6-7. These findings are worst at C5-6 where there is a small protrusion type herniation which results in mild central canal narrowing. There is disc desiccation from C4-5 through C6-7.[3]

Dr. Killingsworth examined claimant on January 7, 2013, for an annual examination. Claimant complained of pain in the upper thoracic area and right neck swelling and

---

[2] Andrews Depo., Ex. B at 19.

[3] *Id*. at 10.

described having fallen out of a truck and slipping on ice. Dr. Killingsworth testified this was the first time claimant complained of pain in her neck and upper back. Dr. Killingsworth did not evaluate claimant's thoracic or cervical spine on January 7, 2013.

Claimant followed up with Dr. Andrews on January 15, 2013, to discuss the MRI results. Claimant complained of thoracic back pain, intermittent sharp headaches, and right shoulder pain. After performing a physical examination and reviewing claimant's records, Dr. Andrews concluded:

> Almost 12 weeks after lifting injury at work. Main complaints are neck and upper back pain which have improved to some extent with physical therapy. Although she had endorsed some upward radiation of her low back pain after the initial injury, the onset of her neck and upper back pain was about 5 weeks after her initial injury and cannot be definitively linked to her lifting injury.
>
> Her low back pain is back to her baseline. An acute musculoskeletal injury from lifting should have improved by now, as her low back pain has. . . . Any persistent pain or spasm in her neck and upper back is likely due to her degenerative disease or stress. It is possible her tension-type headaches may be related to her neck pain and spasm or may be due to stress. I am unsure of the cause of her right-sided neck swelling and there is no indication this is related to her work-related injury.[4]

Dr. Andrews released claimant from her care to regular work duties on January 15, 2013. Dr. Andrews testified the October 26, 2012, accident was not the prevailing factor in causing claimant's cervical problems. She did not know what the prevailing factor for claimant's cervical problems could be. Dr. Andrews said, "I'm not sure. Maybe it's a childhood disease, but I have no idea."[5]

Orthopedic surgeon Dr. Edward Prostic examined claimant on April 26, 2013, at her counsel's request. Claimant indicated she had a constant ache in the base of her neck with pain radiating upward and downward with bifrontal headaches. She reported stiffness upon awakening and worsening with extreme motions of the neck, with intermittent numbness of her fingertips. Claimant continued taking medication provided by Dr. Killingsworth. Dr. Prostic reviewed claimant's medical records, history, and performed a physical examination, finding claimant sustained a cervical disc protrusion without objective evidence of radiculopathy. He testified his examination findings were consistent with claimant's complaints, and he found claimant to be at a stable plateau in healing. He wrote:

---

[4] *Id*. at 2-3.

[5] Andrews Depo. at 41.

> On or about October 26, 2012, [claimant] sustained injury to her cervical spine during the course of her employment. Presently, she does not have indications for surgery or epidural injections. She should continue with the medicines prescribed by Dr. Killingsworth. She may return to medium-level [employment].[6]

Using the AMA *Guides*,[7] Dr. Prostic determined claimant sustained an eight percent functional impairment to the body as a whole for the cervical sprain and strain with resulting headaches. Dr. Prostic noted he did not consider claimant qualified for DRE Category III, which would constitute a 15 percent impairment, but he felt claimant deserved more than the 5 percent warranted by DRE Category II. Dr. He explained:

> Well, I thought that she had a cervical disk protrusion that was significantly symptomatic in causing the pain about her shoulder blade and causing headaches. And I thought for that reason it was worth more than the 5 percent that was for DRE Cervical II.
>
> . . .
>
> The Fourth Edition is limited in this fashion. I think the modifier is on page 99, which says you should do a range of motion exam and whichever DRE is closest to the range of motion model, that's the one you should pick. But 15's too high, and I thought 5 was too low, so I chose 8.[8]

Dr. Prostic opined the October 26, 2012, work-related accident is the prevailing factor in causing claimant's injury, medical condition, need for medical treatment and the resulting disability or impairment. Dr. Prostic stated claimant needs future medical treatment in the form of medication and/or therapy. He said, "If she has increasing protrusion at C5-6, she will need epidural steroid injections or decompressive surgery."[9]

In a letter dated December 11, 2013, Dr. Prostic clarified claimant's work restrictions. He wrote, "She may do occasional lifting of up to 40 pounds. She should limit use of vibrating equipment and [avoid] working in positions awkward for her neck."[10]

---

[6] Prostic Depo., Ex. 2 at 3.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[8] Prostic Depo. at 16-17.

[9] *Id*. at 10.

[10] *Id*., Ex. 2 at 1.

Claimant was terminated from respondent effective December 10, 2012, for continued absenteeism. Annette Conrow, director of Acute Care Services, explained respondent's attendance policy. She testified:

> The policy that was in effect when – when [claimant] was here, it was absences will be considered excessive based on the employee's authorized hours each pay period and by the number of occurrences in a rolling twelve-month period. And what it is – for full-time employees, the first level of action is at five occurrences. So after five occurrences is when we usually do the . . . employee action plan.[11]

An employee action plan, the first step in respondent's disciplinary process, was executed by Ms. Conrow and claimant on April 3, 2012, for absenteeism. Ms. Conrow explained this is a type of counseling situation to discuss expectations and improve performance. Claimant continued to be absent from work and was issued a written warning on August 8, 2012. The written warning had a provision whereby claimant was to contact either Ms. Conrow's supervisor, Sara Glover, or Ms. Conrow if she was unable to work a shift. Claimant was issued a final warning on October 2, 2012, after missing a shift on September 29, 2012, without prior approval.

On December 5, 2012, claimant left her shift early without contacting either Ms. Conrow or Ms. Glover. Claimant indicated respondent was overstaffed during that shift, and she requested to leave due to back pain and nausea. She stated a registered nurse (RN) also on duty that evening requested to stay and would work as a CNA for the remainder of the shift. Ms. Conrow disputed claimant's testimony, stating the RN would not volunteer to remain on duty as a CNA. Mark Kirkendall, former house supervisor at respondent, was on duty that evening. He testified the RN asked if she could stay and work, and he allowed claimant to leave. Mr. Kirkendall assured claimant he would contact Ms. Conrow on her behalf. Ms. Conrow stated claimant was aware she should have personally contacted Ms. Conrow or Ms. Glover if she was unable to work. Ms. Conrow noted the absences by request of a physician and some pre-approved absences did not count against claimant for disciplinary purposes.

Claimant was ultimately terminated by respondent on December 10, 2012. The reasons listed on the termination notice included claimant leaving her shift early on December 5, 2012, without a phone call to Ms. Conrow or Occupational Health as agreed upon in the final written warning issued October 2, 2012. It further noted claimant was two hours late for a scheduled shift on December 9, 2012. Jennifer Goehring, Assistant Chief Nursing Officer, testified she incorrectly placed December 9, 2012, on the termination notice. The actual date claimant was late for her shift was December 2, 2012.

---

[11] Conrow Depo. at 7.

Claimant testified her continued absences were due to her divorce and child custody issues.

Claimant acquired employment part-time at Pizza Hut in June 2013. She worked at Pizza Hut as a waitress until August 2013. Claimant stated she left employment because parts of the job were too physically difficult.

Vocational rehabilitation counselor Doug Lindahl interviewed claimant on August 6, 2014, at claimant's counsel's request. Mr. Lindahl reviewed claimant's history, including her educational background and work history for the five years preceding the work incident. Mr. Lindahl reported claimant had a high school education, nurse aide training, some college, and a CNA license. He noted claimant's jobs in the five-year period were in the field of nurse's aide or home health aide. Mr. Lindahl stated claimant would be unable to return to this type of work under the restrictions imposed by Dr. Prostic.

Mr. Lindahl generated a list of 19 unduplicated tasks claimant performed in the 5 years prior to the accident. Dr. Prostic reviewed Mr. Lindahl's task list. Of the 19 unduplicated tasks on the list, Dr. Prostic opined claimant could no longer perform 8, for a 42 percent task loss.

Mr. Lindahl found 125 jobs in the Manhattan area claimant could potentially perform, though he noted only 12 were jobs claimant should reasonably consider. Mr. Lindahl opined claimant could earn $10.25 per hour as a full-time customer service representative for an AWW of $410.00. He agreed claimant could possibly earn a wage within 90 percent of her wage at respondent. Mr. Lindahl did not know how claimant had conducted any job searches, only that she was unemployed at the time of the interview.

Claimant began employment with a motorcycle repair shop in October 2014. She works in a clerical position and earns $7.50 per hour working 16 to 20 hours per week.

On January 14, 2015, claimant met with vocational rehabilitation counselor Terry Cordray at respondent's request. Mr. Cordray conducted a routine evaluation, reviewing claimant's educational, social, and work histories. Mr. Cordray noted claimant had 30 community college credit hours and transferrable clerical skills. He estimated claimant could earn at least $10.00 per hour in a clerical position and make the same wages she earned while at respondent. Further, Mr. Cordray opined claimant has not made a good faith effort in finding employment. He noted claimant did not apply for jobs between August 2013 and August 2014, and she applied for only 5 jobs since August 2014.

Mr. Cordray stated claimant could do medium-level work under Dr. Prostic's restrictions as listed in the April 2013 report. He then agreed a lift limit of 40 pounds, as clarified by Dr. Prostic's December 2013 letter, does not constitute medium-level employment. Mr. Cordray noted claimant could do any work according to Dr. Andrews, who did not impose permanent restrictions.

Claimant testified she continues to have problems with her neck and shoulders and severe headaches. Claimant opined she would be unable to return to work as a CNA with her present physical problems.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-508(f) states, in part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> . . .
>
> (2)(B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2012 Supp. 44-510h(e) states:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

ANALYSIS

1. Claimant did not sustain personal injury by accident to her cervical spine arising out of and in the course of her employment.

The Board disagrees with the ALJ's conclusion that claimant suffered an injury to her cervical spine as a result of the October 26, 2012, work-related accident. When claimant was examined by Dr. Killingsworth, three days after the accident, her complaints were of low back pain and pain shooting down her legs. Dr. Killingsworth recorded no neck complaints on October 31, 2012. Dr. Killingsworth testified the first recorded complaints of neck pain were on January 7, 2013. At that time, Dr. Killingsworth diagnosed chronic low back pain and recent right-sided thoracic pain. Claimant had complaints of thoracic pain as far back as January 7, 2008. A record of the examination on that date contains a pain drawing showing mid-thoracic complaints and a notation by Karen Hawes, ARNP, of chronic soreness in the thoracic area.

Claimant saw Dr. Andrews on November 21, 2012, and complained of left low back pain and pain in the upper thoracic area between the shoulder blades. On November 27, 2012, claimant went to the Mercy Regional emergency room with complaints of severe upper thoracic pain. The initial intake note shows complaints of a stiff neck. On the pain drawing prepared by the treating physician, only the thoracic area was noted. There was

no notation of pain in the cervical spine. On the physical exam report checklist, in the section relating to the neck, the physician noted a painless range of motion and that the neck was not tender. The next day, November 28, 2012, claimant was examined by Dr. Andrews, who noted the primary problem as the right thoracic back. She noted claimant was positive for neck pain, with an onset of pain the day before the examination.

After reviewing the MRI, Dr. Andrews, in her January 15, 2013, examination report, wrote claimant's neck complaints were not related to her work injury. Dr. Andrews testified the October 26, 2012, work-related accident was not the prevailing factor causing claimant's neck complaints. Dr. Prostic disagreed and testified the prevailing factor for claimant's neck condition was the work-related accident. The Board places more weight in the opinion of Dr. Andrews. Dr. Andrews provided treatment three days after the accident and was in a better position to assess the prevailing factor of claimant's condition. Claimant has failed to prove her neck condition arises out of and in the course of her employment with respondent.

2. Claimant is not entitled to future medical treatment.

The ALJ found claimant was not entitled to an award of future medical treatment. The Board agrees. The evidence supports a finding that the cervical problems experienced by claimant are not work-related. There is no evidence in the record claimant is in need of future treatment for her low back or thoracic conditions, both of which appear to be preexisting conditions. The medical evidence does not rebut the presumption claimant was no longer in need of medical treatment after she reached maximum medical improvement.

CONCLUSION

Claimant failed to prove her neck condition arose out of and in the course of her employment with respondent. Claimant is not entitled to future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated June 5, 2015, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com
toni@jkcooperlaw.com

Joseph C. McMillan, Attorney for Self-Insured Respondent
jmcmillan@mulmc.com
ecruzan@mulmc.com

Rebecca A. Sanders, Administrative Law Judge